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Nos. 80-1972 and 80-2098

In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL CLEMENTE, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT COLUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the group of individuals associated in this case to commit unlawful acts for profit constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* (both petitioners).

2. Whether the application of the RICO statute to groups of individuals associated for illegal purposes, renders the statute unconstitutionally vague (petitioner Clemente).

3. Whether the district court instructed the jury incorrectly on the RICO conspiracy count (petitioner Clemente).

4. Whether an invalidation of the RICO counts would require reversal of petitioner Clemente's non-RICO convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1981. A petition for rehearing was denied on April 14, 1981. The petition for a writ of certiorari in No.

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[1]"Pet. App." refers to the appendix to the petition in No. 80-2098.

80-1972 was filed on May 22, 1981, and the petition in No. 80-2098 was filed on June 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Clemente was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count 1); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2); 35 counts of bribery, in violation of Section 302(b) of the Labor-Management Relations Act ("Taft-Hartley Act"), 29 U.S.C. 186(b) (Counts 49-83); 56 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts 87-142); five counts of tax evasion, in violation of 26 U.S.C. 7201 (Counts 200, 202, 204, 206, 208); and five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 201, 203, 205, 207, 209). Petitioner Colucci was convicted on both RICO counts, 13 counts of extortion (Counts 3-6, 13), four counts of bribery (Counts 8-11), and one count of filing a false tax return (Count 212).

Petitioner Clemente was sentenced to concurrent 20-year terms of imprisonment on Counts 1 and 2; six months' imprisonment on each of Counts 49 through 83, to be served consecutively to each other but concurrently with the sentences on Counts 1 and 2; 20 years' imprisonment on each of Counts 87 through 142, to be served concurrently with each other and with the sentences on all other counts; four years' imprisonment on each of Counts 200, 202, 204, 206 and 208, to be served consecutively to each other but concurrently with the sentences on all other counts; three years' imprisonment on each of Counts 201, 203, 205, 207 and 209, to be served consecutively to each other but concurrently with the sentences on all other counts; and a total fine of $50,000.

Petitioner Colucci was sentenced to concurrent five and one-half year terms of imprisonment on Counts 1, 2, 3-6, and 13; one year's imprisonment on each of Counts 8 through 11, to be served consecutively to each other but concurrently with the sentences on all other counts; three years' imprisonment on Count 212, to be served concurrently with the sentences on all other counts; and a total fine of $5,000. The court of appeals affirmed (Pet. App. 1a-31a).

The evidence at trial is related in detail in the opinion of the court of appeals (Pet. App. 3a-12a). Briefly, it established the existence of an association of persons organized for the purpose of controlling all aspects of the New York and New Jersey waterfront business. Petitioner Clemente was the ringleader of the enterprise and petitioner Colucci was president of a New Jersey local of the International Longshoremen's Association (ILA). Other members of the enterprise, who were co-defendants at petitioners' trial, included Tino Fiumara, the New Jersey waterfront "boss"; Carol Gardner, the president of another New Jersey local of the ILA; Thomas Buzzanca, the president of two New York ILA locals; and Gerald Swanton, a vice-president of a shipping company in New York (*id.* at 3a).[2]

The foundation of the enterprise was its control of the ILA in New York and New Jersey. By threatening work stoppages, the enterprise was able to extort money from shipping companies and to influence their decisions regarding the allocation of ship-servicing contracts. Using its control over such contracts, the enterprise was likewise able to extort money from the ship-servicing companies. Only those shipping and ship-servicing companies that paid the

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[2]The joint petition for a writ of certiorari of co-defendants Fiumara, Buzzanca, and Michael Copolla, Fiumara's assistant, is currently pending in this Court. *Fiumara* v. *United States*, No. 80-1800 (filed Apr. 27, 1981).

amounts demanded and otherwise cooperated with the enterprise had their ships' cargos loaded and unloaded without interruption or obtained and retained contracts to provide services (Pet. App. 3a-4a).

The proof against petitioners and their co-defendants largely concerned their individual dealings with William Montella, the principal government witness, who was employed by several ship-servicing companies during the period covered by the indictment (Pet. App. 4a-12a). Montella testified that from 1970 to 1972 he had made payoffs to Swanton in order to retain certain ship-servicing contracts with Netumar Steamship Line for Montella's employer and that Swanton had told him that he was associated with petitioner Clemente, who would share in the payoffs (*id.* at 5a). From 1974 to 1976, according to Montella's testimony, Montella delivered $500 per month in cash to Clemente to retain contracts for a new Montella employer (*id.* at 6a-7a). In 1976, when Montella's bid on behalf of his employer for additional contract work had been rejected, he appealed to Clemente, who advised him how to obtain the work and who demanded an additional $500 per month in payments. From January 1977 through December 1978, Montella testified, he made $1000 monthly payments to Clemente (*id.* at 7a). During the same period that Clemente received payments from Montella, he was collecting approximately $1 million from Netumar itself in return for his arranging to achieve reductions in some gross overcharges by a stevedoring company with which Netumar did business (*id.* at 7a).

As to petitioner Colucci, Montella testified that in 1975 he had agreed to pay a lump sum of $10,000 and monthly payments of $2,000 to co-defendant Carol Gardner and to petitioner Colucci in order to allow a company owned by some friends of Montella's to retain contracts with the Concordia Line for work on the New Jersey waterfront (Pet. App. 8a). When Montella thereafter began receiving separate demands from Gardner and Colucci, Montella

complained to petitioner Clemente, who advised him that he should have approached Clemente initially to avoid having to deal with Gardner and Colucci (Pet. App. 9a). Montella testified further that Clemente told him he should live up to his "commitment," but at Clemente's suggestion he consulted another of the co-defendants, Thomas Buzzanca, who arranged for Montella to make the Concordia Line payments directly to him and who told Montella to advise Colucci and Gardner to await further instructions from Buzzanca (*ibid.*). After transmitting this message, Montella was no longer approached by Gardner and Colucci for Concordia Line payments. During this same period, however, Montella had abandoned efforts to retain a Chilean Line account because of pressure from Colucci and Gardner for payments, which they demanded in the name of their "boss," who, according to Montella, was Tino Fiumara, another of petitioners' co-defendants (*id.* at 10a-11a).

ARGUMENT

1. Petitioners contend (Clemente Pet. 4-6; Colucci Pet. 6-9) that the conduct for which they were indicted and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts in this case were based on an "enterprise" consisting of an association organized for exclusively illegal ends, and that the RICO statute is applicable only to legitimate enterprises that are subsequently infiltrated by criminal elements. After the filing of the instant petitions, however, this Court expressly held in *United States* v. *Turkette*, No. 80-808 (June 17, 1981), that the RICO statute applies to wholly illegitimate as well as to legitimate enterprises. Accordingly, petitioners' claim must fail.

2. Petitioner Clemente contends (Pet. 6-8) that the RICO statute, as employed in this case, is unconstitutionally vague. Specifically, he argues (Pet. 6) that applying the

RICO statute to an "association in fact formed for the very purpose" of committing illegal acts "renders the enterprise element indistinguishable from a single conspiracy to commit the predicate crimes" and that this "in turn makes it impossible to fathom the meaning of a conspiracy under 18 U.S.C. 1962(d) * * *."

Petitioner's argument misapprehends the meaning of the "enterprise" element of a RICO offense. Under 18 U.S.C. 1961(4), an "enterprise" is an "entity," including, as in this case, a "group of individuals associated in fact." See *United States* v. *Turkette, supra*, slip op. 6. As such, it is not the same thing as a conspiracy, which is an agreement to commit particular unlawful acts. As the Fifth Circuit observed in *United States* v. *Diecidue*, 603 F. 2d 535, 546 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), the mere fact "[t]hat the formation of the enterprise and the conception of the conspiracy [to commit unlawful acts in furtherance of the enterprise] may have occurred simultaneously in no way detracts from the Act's applicability." Indeed, every court of appeals to have addressed the vagueness claim has rejected it. See *United States* v. *Aleman*, 609 F. 2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F. 2d 472, 479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Parness*, 503 F. 2d 430, 440-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). See also *United States* v. *Huber*, 603 F. 2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

Furthermore, since petitioner Clemente's act of conspiring to commit the predicate acts of racketeering was itself clearly illegal (see 18 U.S.C. (& Supp. III) 1961(1)), he unquestionably had "fair warning * * * as to what conduct is criminal * * *" (*Huddleston* v. *United States*, 415 U.S.

814, 831 (1974)) and was not "forced to speculate * * * whether his conduct [was] prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979).

3. In instructing the jury on the RICO conspiracy count, the district court stated (Tr. 12614-12615) that "[i]n order to find the defendant * * * guilty of the conspiracy charged in the indictment, you must find beyond a reasonable doubt that at least two connected violations of one or both of the two statutes that I have just described to you in connection with Counts 3 through 142 [the Hobbs Act and "Taft-Hartley Act" counts], were objectives of the conspiracy." Petitioner Clemente contends (Pet. 8-10) that the instruction was incorrect because, under 18 U.S.C. 1962(d), a defendant must be found to have "entered into an agreement with the *personal* objective (*i.e.*, specific intent) of participating in the enterprise's affairs *through* the commission of two or more predicate crimes constituting a pattern of racketeering activity" (Pet. 10; emphasis petitioner's). Petitioner, however, failed to object to this portion of the court's charge (see Pet. App. 25a) and thereby waived his right to challenge it now. Fed. R. Crim. P. 30; see, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). Moreover, a reversal of petitioner Clemente's conviction on the conspiracy count—for which he received a sentence of 20 years—could not affect the length of his imprisonment or have other significant collateral consequences, because he received concurrent 20-year sentences on the RICO counts and on each of the 56 extortion (Hobbs Act) counts (Pet. App. 30a).

At all events, his claim is not persuasive. While it is true that a defendant must have agreed personally to commit or to aid and abet the commission of at least two predicate acts of racketeering in order to be convicted of a RICO conspiracy, the above-quoted instruction can fairly be read to state that requirement. This is especially true when the

instruction is viewed in the context of the court's complete charge to the jury. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Thus, at the outset of the court's RICO conspiracy instruction (Tr. 12607), the jury was informed that "Count 2 of the indictment charges that six of the defendants [including petitioner] * * * and others known and unknown, conspired to violate federal law *by participating in the conduct of the affairs of the enterprise described in Count 1 through a pattern of racketeering activity*" (emphasis added). See also Tr. 12608 and 12614. In its instructions on Count 1, the court made it clear that a "pattern of racketeering activity" consists of "at least two of the acts of racketeering activity alleged in the indictment" (Tr. 12597). Read together, these instructions correctly and clearly advised the jury that, in order to convict petitioner, it must find that he agreed to participate in the enterprise through the commission of at least two racketeering acts.[3]

4. Petitioner Clemente contends (Pet. 11-14) that if the RICO counts were invalid, his non-RICO convictions also must be reversed because of misjoinder under Fed. R. Crim. P. 8 and because of evidentiary spillover from the RICO counts. Since the Court's decision in *Turkette* removes the predicate for this contention, it plainly affords no basis for further review.

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[3]In any event, petitioner could not have been prejudiced by the instruction even if it was defective. It is implicit in petitioner's joint conviction with one or more of his co-defendants on 91 Hobbs Act and "Taft-Hartley" counts that the jury believed that he had conspired "personally" to commit two or more racketeering acts.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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